

Explaining the Five Major Maxims of Fiqh

By Sheikh Ismail Albatnuni

Translated by Abu Najm bin al-Iskandar

Textbook

FQH 4201 - Maxims of Fiqh

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Introduction

Defining “Juristic Maxims” or [al-Qawā'id al-Fiqhiyyah]

*Linguistic Definition of a “Legal Maxim”
[Qā'idah]*

In the Arabic language, Qawā'id is the plural of Qā'idah. Qā'idah means “the base of the foundation,” “the foundation of the structure.” Qawā'id are “foundations” and the Qawā'id of a house are its foundations. This meaning is found in what Allah ﷻ said in the verse:

﴿وَإِذْ يَرْفَعُ إِبْرَاهِيمُ الْقَوَاعِدَ مِنَ الْبَيْتِ وَإِسْمَاعِيلُ رَبَّنَا تَقَبَّلْ مِنَّا﴾

*{And when Ibrāhīm and Ismā'il raised the foundations of the House, [saying]: "Our Lord, accept it from us."}*¹

And His ﷻ statement:

﴿فَأَتَى اللَّهَ بُنْيَانُهُم مِّنَ الْقَوَاعِدِ﴾

*{Thus, Allah destroyed their homes from the foundations}*²

Fiqh linguistically means “comprehension”.

Technically, the term *Fiqh* means “knowledge of actionable legal rulings arrived at through their particular evidences.”

Technical Definition of ‘Juristic Maxim’ *[Qā'idah]*

A juristic maxim is a general legal ruling [Ḥukm] that can be applied to most of its derivative parts in order to identify the particular legal rulings [‘Aḥkām]³ of those derivative parts based on it.

¹ Al-Baqarah: 127

² An-Nahl: 26

³ plural of *Ḥukm*.

Explanation of the Technical Definition

“A general legal ruling...”

Hukm linguistically means “the attribution of something to something else,” or “its negation,” as in when a person says, “the man is standing”- “standing” is his *Hukm*. Another example is when a person says, “interest is prohibited”. “Inviolability” is attributed to the term “interest,” and thus, that is its *Hukm*.

The term “general” [‘Aghlabī] means the *Hukm* does not apply to most of the ruling’s derivative parts [Juzay’āt], rather it is only intended to refer to the majority of a ruling’s ancillary juristic matters [Furū’].

The author used the word “general” [‘Aghlabī] in order to exempt, by means of that term, foundational legal maxims [al-Qawā'id al-'Usūliyyah] because they are universal maxims that apply to all of their derivative parts as well as ancillary matters. An example is the maxim: “The form of a command in the texts calls for the ruling of obligation.” This is a foundational legal maxim [Qā'idah 'Usūliyyah] that means the principle [‘Aṣl] for each command is that it indicates an obligation. As for juristic maxims [al-

Qawā'id al-Fiqhīyyah] then they generally do not refer to all ancillary matters, rather only some juristic topics. Due to that, the basic principle of juristic maxims is to employ them. However, when we refer to books about legal maxims and books of jurisprudence, we find that there are some ancillary juristic matters [Furū` Fiqhīyyah] which are integral and found among the applications of some maxims, however they do not come under them nor is there a call to deduct evidence from them. [Another reason for ancillary juristic matters not coming under relevant juristic maxims] is due to their being very close in resemblance to other maxims, serving as enough of a reason for [the ancillary juristic matter] not to come under them.

“...that can be applied to most of its derivative parts”

This is to be understood through the meaning of the term “general” [‘Aghlabī] and as previously mentioned, [in contrast with] a foundational legal maxim [Qā'idah 'Usūliyyah] which applies to all derivate parts. The statement “...most of its derivative parts” denotes a “majority” or “most” regarding the [juristic] maxim, and due to that, some of the ancillary juristic matters were

deduced as a matter of exception; considering one cannot find in the books of *Usūl al-Fiqh*, under any circumstance, a [foundational] maxim, [about which] it is said, “[This maxim] is considered as among the exceptions,” because deductions from foundational maxims are always by means of evidence from the Book and the Sunnah or similar to that. In contrast, when scholars derive principles and debate juristic maxims, even the “Major Ones”, they end the discussion with their views on “what is excluded from the [juristic] maxim”, indicating that they do not encompass all ancillary matters.

“...in order to identify their particular legal rulings based on it”

These “particulars” are from the “identification”, and they are the byproduct of juristic maxims. “In order to identify” in other words, “in order to identify the legal rulings [‘Aḥkām] based on these [juristic] maxims.” Thus, if perhaps a person asks about a legal issue and, as takes place a majority of the time, there is nothing prepared by way of evidence, then [a juristic] maxim can be used as evidence.

The Difference Between Usūl al-Fiqh and Qaṣwā'id al-Fiqh

Usūl al-Fiqh, or principles of jurisprudence, are universal legal rulings by means of which deductions are made for the inference of derivative legal rulings.

Qaṣwā'id al-Fiqh, or maxims of jurisprudence, are general legal rulings which encompass legal matters that share resemblances among derivative legal rulings.

The Most Famous Books on Juristic Maxims

- 1) *Al-Furūq* by al-Qarāfi al-Mālikī [d. 684 AH]
- 2) *Al-Ashbāh wan-Nazā'ir* by 'Ibn Nujaym al-Ḥanafī [d. 970 AH]
- 3) *Al-Qaṣwā'id fil-Fiqh* by al-'Imām 'Ibn Rajab al-Ḥanbalī [d. 795 AH] [a book in which maxims are compiled]
- 4) *Al-Manthūr fil-Qaṣwā'id al-Fiqhiyyah* by al-'Imām Badr ad-Dīn Muḥammad bin 'Abd Allah az-Zarkashī ash-Shāfi'i [d. 794 AH]

5) *Kitāb al-‘Ashbāh wan-Nazā’ir* by Jamāl ad-Dīn `Abd ar-Raḥīm bin Ḥasan bin `Alī al-‘Asnawī ash-Shāfi`ī [d. 772 AH]

6) *Kitāb al-‘Ashbāh wan-Nazā’ir* by `Ibn al-Mullaqin [d. 804 AH]

7) *Al-Madkhal al-Fiqhī ul-‘Ām* by Mustafā az-Zurqā’ al-Ḥalabī [d. 1420 AH]

8) *Al-Qawā`id fīl-Furū`* by `Alī bin `Uthmān al-Ghazī ad-Dimashqī al-Ḥanafī, Sharaf ad-Dīn [d. 799 AH]

9) *Manzūmat ash-Shaykh `Abd ar-Raḥman bin Nāṣir as-Sa`dī al-Ḥanbalī*, may Allah have mercy on him [d. 1376 AH]



Importance of Juristic Maxims

1) They are a means of support which save the student of knowledge from a great deal of investigation. Al-Qarāfi, may Allah have mercy on him, said: “Whoever subdues

jurisprudence by means of its maxims frees himself from having to memorize so many derivative rulings due to their falling under the generality [of the maxims].”

2) It inculcates in the student of knowledge the faculty of understanding, deduction, insight and independent deliberation [Ijtihād] in the ancillary matters of jurisprudence whereof the student of knowledge is not simply a memorizer of the books of ancillary matters of jurisprudence. Rather, the student of knowledge is only encouraged to join any given issue with its counterpart, parallel and what resembles it among other legal issues. This benefits the student in keeping him far away from stagnancy in thought and juristic insight, thus transitioning, on that basis, from the stage of imitation to something else, to a stage of expansion- and it is the stage of drawing legal conclusions and possessing legal insight.

3) The study of juristic maxims, being acquainted with and comprehending them, helps in the research of judges [Qudāh] and those who deliver legal verdicts [Muftiyān], to pinpoint solutions for newly arising issues and incidental events, thus forging an easier path and shorter route to said solutions. Due to that, some said: “Indeed

the ruling on studying juristic maxims and being acquainted with them, for judges and those who deliver legal verdicts, is that it is an individual obligation, and for the rest, it is a communal obligation.”

4) In the majority of instances, juristic maxims are agreed upon by the juridically-independent scholars [Mujtahidīn], so the instances in which there is disagreement are few. Thus, the study of juristic maxims and familiarity with them cultivates in the student of knowledge the faculty of comparing different schools. And due to the faculty of comparison, the various routes of said differences between the schools and the reasons for them are clear.”

Source of Juristic Maxims

What is meant by the subject heading is the origin for each maxim and the basis for its utilization. The sources of maxims are divided into three:

1) Juristic maxims whose sources are the legal texts of the Book and the Sunnah

We find that some maxims are part of a verse or narration. Among the verses that serve as an example of this is:

﴿وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا﴾

*{And Allah permits sales and prohibits interest}*⁴

This verse, despite the conciseness of its wording, gathers the various types of sales- what Allah ﷻ permits and what He ﷻ prohibits- aside from what He ﷻ exempts.

Among the examples from the Sunnah is that of his ﷺ statement:

لَا ضَرَرَ وَلَا ضِرَارَ

*“There is no initiating harm nor reciprocating harm.”*⁵

This is a maxim and as well as a component of evidence. Also, there is his ﷺ statement:

كُلُّ مُسْكِرٍ خَمْرٌ

*“All intoxicants are Khamr.”*⁶

⁴ Al-Baqarah: 275

⁵ Al-‘Imām Aḥmad transmitted it as well as Ibn Mājah in his *Sunan*.

⁶ Al-Bukhārī and Muslim transmitted it.

2) Juristic maxims whose sources are not textual however they produce a connotation of evidence

For example: “Matters are according to their intent.” This is not an evidence in and of itself, rather the evidence points to its soundness as a maxim. The actual proof is his statement ﷺ:

إِنَّمَا الْأَعْمَالُ بِالنِّيَّاتِ

*“Actions are only according to intentions.”*⁷

Another example is the statement: “What is customary is [contractually] effective.” It is taken from His statement ﷺ:

﴿خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ﴾

*{Show forgiveness, enjoin al-`Urf and turn away from the foolish}*⁸

Al-`Urf is “what is customary”.

⁷ Al-Bukhārī and Muslim transmitted it.

⁸ Al-`A`rāf: 199

3) Juristic maxims that are not proofs nor do they connote proof, rather the evidence only indicates its soundness as a maxim

For example: “The fundamental ruling on things is permissibility.” This is a maxim not transmitted in any text nor implied [by a text], rather it is inferred from evidence. The [previous maxim] was taken from His statement ﷺ:

﴿قُلْ لَا أَجِدُ فِي مَا أُوحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ إِلَّا أَنْ يَكُونَ مَيْتَةً﴾

{Say: “I do not find in what is revealed to me something prohibited to eat for one who eats it, except that it is Maytah (i.e. not slaughtered according to Islamic law)}⁹

And:

﴿هُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا﴾

{He is the One who created for you all of what is in the earth}¹⁰

⁹ Al-‘An`ām: 145

¹⁰ Al-Baqarah: 29

Issue: Is it permissible for us to use a juristic maxim as a legal evidence from which a legal ruling is deduced?

It is not permitted to consider maxims as evidences for deducing legal rulings for two reasons:

1) These maxims are of benefit to various ancillary matters and are a means for joining and connecting them. It is not reasonable that what is a benefit and means for joining [legal matters] to also be evidence for deducing ancillary legal matters.

2) Most of these maxims are not void of exceptions- thus a matter that is investigated with regards to its legal ruling can be from among the exceptional issues and ancillary matters.





The First Major Maxim: “Matters are according to their intentions.”

الفقه مبني على قواعد ... خمس هي الأمور بالمقاصد

Jurisprudence is founded in maxims ... Five of them- they are: “Matters are according to intentions.”

Linguistic Definition of the Maxim

The term “matters,” or ‘*Umūr*, is the plural of ‘*Amr* and it means “state” and “affair”. “Intentions,” or *Maqāṣia*, is the plural of *Maqṣid*, and it means “intention” and “will”. The technical meaning is “the legal ruling set for a matter is according to what is intended from that matter.”

The intention [Niyah] linguistically means “determination” and “purpose”. The meaning is “the decision and purpose of the heart to do a specific act”; or

as others expressed it in the saying: “The emergence of a specific act from the heart”.

Technical Definition of the Maxim

Scholars hold the view that verbal, physical actions, obligations and conduct differ in their outcomes and legal rulings. These legal rulings effect the validity, invalidity, performance, reward, and punishment of the actions. And they are in turn influenced by the intention.

Importance of the Maxim

It should suffice to know that this maxim is based on the narration: “Actions are only according to intentions”¹¹. Thus, the status of this maxim is derived from the status of the narration. We will mention briefly the status of this narration:

*This narration is among the major maxims of Islam. The scholars are unanimous about its validity and acceptance. Al-Bukhārī began his book *Aṣ-Ṣaḥīḥ* with it and prefaced his book with it, indicating that every act in which the

¹¹ Al-Bukhārī and Muslim transmitted it.

Face of Allah ﷻ is not sought is invalid and fruitless for a person in the life of this world and the Afterlife.

*This narration is one of the narrations around which the entire *Dīn* revolves. It was transmitted on authority of the two venerable scholars- *al-ʿImām* ash-Shāfiʿī and *al-ʿImām* ʿAḥmad- may Allah be pleased with them both, that the narration in question is “a third of knowledge and a third of Islam.”

Other Forms of the Maxim

- 1) “The means [to objectives] have the legal rulings of the objectives.”
- 2) “Actions are only according to intentions.”
- 3) “There is no deed except it occurs by means of an intention.”
- 4) This last expression is how Shaykh as-Sa`dī expressed the maxim in his poem:

النّية شرط لسائر العمل ... فيها الصّلاح والفساد للعمل

“The intention is a stipulation for every deed ... In it rests the soundness and corruption of the deed.”

Proofs for the Maxim

The verse:

﴿وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ
قُلُوبُكُمْ﴾

*{There is no harm for you in that which you err, rather in what
your hearts intend}*¹²

The verse:

﴿فَمَنْ كَانَ يَرْجُوا لِقَاءَ رَبِّهِ فَلْيَعْمَلْ عَمَلًا صَالِحًا وَلَا يُشْرِكْ بِعِبَادَةِ
رَبِّهِ أَحَدًا﴾

*{Thus, he who looks forward to meeting his Lord, let him
perform righteous deeds and not associate anyone in worship of
his Lord}*¹³

¹² Al-‘Aḥzāb: 5

¹³ Al-Kahf: 110

The verse:

﴿وَمَنْ يَخْرُجْ مِنْ بَيْتِهِ مُهَاجِرًا إِلَى اللَّهِ وَرَسُولِهِ ثُمَّ يُدْرِكُهُ الْمَوْتُ
فَقَدْ وَقَعَ أَجْرُهُ عَلَى اللَّهِ﴾

*{And whoever leaves his home as an emigrant towards Allah and His Messenger and death reaches him, then his reward is incumbent upon Allah}*¹⁴

From the Sunnah:

The statement of the Prophet ﷺ: ‘*Actions are only according to intentions,*’ [whose] authenticity is agreed upon.

The narration of `Ā’ishah ؓ that the Messenger of Allah ﷺ said:

لَا هِجْرَةَ بَعْدَ الْفَتْحِ وَلَكِنْ جِهَادٌ وَنِيَّةٌ وَإِذَا اسْتُنْفِرْتُمْ فَانْفِرُوا

¹⁴ An-Nisā’: 100

“There is no emigration after the Conquest [of Makkah], rather fighting and intentions [remain]; and if you are called to march forth for battle, then march forth.”¹⁵

Application of the Maxim

The Marriage Contract

Whoever intends chasteness through a marriage contract, then the marriage is recommended. Whoever intends to make the woman permissible for her previous husband through the contract, then the marriage is prohibited.

The Last Will & Testament

If benefitting the poor is intended by the will, it is recommended. If harming the inheritors is intended by the will, it is prohibited.

Killing Someone

Case A: Someone kills an individual intentionally and out of enmity. This killer is killed in retaliation.

¹⁵ Ṣaḥīḥ Muslim #1864

Case B: The killing resembles one done intentionally, certainly the killer intended to harm the one killed, however he did not intend to kill the victim, i.e. it was an accident. This is like someone who takes aim at prey, and instead kills a person. This killer owes the legal expiation [*Kafārah*].

Case C: Someone is delegated the legal authority to execute a person in the community upon whom the legal punishment is due. There is no sin or anything due from this killer.

In the first example, the person killed another intentionally and in the second, it resembled the intentional killing or it was an accident, thus the result and consequence now differs due to the intention. In the third example, the person was given authority in the matter. Thus, the form of the act is uniform- in each act there is a killing. However, the result differs, as we mentioned, due to the intention. Perhaps this example makes the effect of the intention clear in an obvious way.



Topics Related to Intention [Niyyah]

The Locus of the Intention

Most of the people of knowledge adopt the view that the locus of the intention is the heart. As for the view that the locus of the intention is the brain or the tongue, then it is a rare view that is not sound. The majority view is supported by many textual proofs, such as:

The statement of Allah ﷻ:

﴿بَلَىٰ وَلَٰكِنْ لِّيَطْمَئِنَّ قَلْبِي﴾

{He said, 'Yes! Rather it is in order to calm my heart}'¹⁶

The verse:

﴿لَهُمْ قُلُوبٌ لَا يَفْقَهُونَ بِهَا﴾

{They have hearts with which they do not comprehend}'¹⁷

The verse:

¹⁶ Al-Baqarah: 260

¹⁷ Al-'A`rāf: 179

﴿فَإِنَّهَا لَا تَعْمَى الْأَبْصَارُ وَلَكِنْ تَعْمَى الْقُلُوبُ الَّتِي فِي الصُّدُورِ﴾

*{For indeed the eyes are not blind, rather the hearts in the chests are blind}*¹⁸

There is no mention of the brain at all in these instances, thus it demonstrates that the locus of the intellect is the heart, not the brain.

Benefits of Intention

Intentions are legislated for two matters:

1) To differentiate acts of worship from customary activities. Thus, if one abstains from eating at the onset of dawn until the setting of the sun, for a diet, in compliance with a doctor's order, or due to a lack of need to eat and drink, then such abstention is a permissible matter that is neither rewarded nor punished. If the abstention from food was with the intention of a legislated fast for the sake of Allah ﷻ, then it is an act of obedience that will be rewarded.

¹⁸ Al-Hajj: 46

2) To differentiate some acts of worship from others, like the mid-afternoon prayer from the late-afternoon prayer, for example. They both appear the same in form and that which demarcates the separation between them is the intention.

Forms of Association [Tashrik] in Intention

First Form: to introduce into an act of worship something that is not an act of worship as a basis, and it is of two types:

1) To introduce into an act of worship something invalid

For example: to introduce into a slaughter for the sake of Allah ﷻ the intention to do so for saint so-and-so as well. This would invalidate the act of worship.

2) To introduce into an act of worship something valid

For example, to introduce into the major ritual purification [Ghusl] the intention for the Friday prayer and to cool off oneself.

Second Form: to intend an act of worship along with another act of worship, which is also of different types:

- 1) To introduce into an obligatory act another obligatory act- this is not permissible;
- 2) To intend an act of Sunnah along with an obligatory act- this is permissible;
- 3) To intend a supererogatory act along with another supererogatory act- this is an extensive matter and is permissible.

Stipulations of Intention [[Shurūṭ an-Niyyah]

The jurists [Fuqahā'], may Allah have mercy on them, mentioned stipulations for the intention:

- 1) Being Muslim [Islam]. This is a stipulation for every act of worship because intentions and acts of worship are not valid except from a Muslim.
- 2) The ability to distinguish between matters [Tamyīz]. This is because if such a person's intention is sound, indeed his act is sound. And certain acts are obligatory for him to perform.
- 3) Knowledge of the intended act [ʿIlm bil-Manwī]. It is essential that the individual have certain knowledge of the intended act- is it an act of worship or not? What are its

characteristics? Is it an obligatory act or not? And they should be certain about answers to similar questions.

4) Absence of negators of the intention [Munāf lil-Nīyyah]. A person must not negate the intention.

Two matters negate intention:

1) Discontinuation [Qaṭ'a]- in other words, to intend to discontinue an act of worship.

For example, if a person begins the prayer, then intends to stop the prayer- his prayer is discontinued. However, what about the person who hesitates in that intention- has he discontinued it or not? The correct view is that [his prayer] is not discontinued since the basis of the intention is still present.

2) Apostasy from Islam [Riddah]

*Issue: Does discontinuation [of an act] require an intention?

1) There is the discontinuation which is defined by timing, for example: removal of the pilgrimage garb and breaking the fast- these things require an intention with regards to discontinuation.

2) Discontinuation not defined by timing, for example: lying, fornication and consuming intoxicants- these are things in which the command to discontinue them applies at all times, so they do not require an intention. Though, if a person intends to discontinue them, it is best.

*Issue: The abandonment of prohibited things is divided into three categories:

1) Abandonment of something prohibited out of the inability to commit it- this merits punishment.

2) Abandonment of something prohibited out of heedlessness- this neither merits reward nor punishment.

3) Abandonment of something prohibited out of obedience- this merits reward.

Subordinate Maxims

“Expressions in contracts are according to their intent and meaning.”

Examples of this form of the maxim are:

1) If someone says: “I will give this as a gift to you for one-tenth its value.” It is a sale and not a gift since it has a price.

2) If someone declares divorce through one of the metaphors for divorce while intending it as such, then the divorce takes place.

3) The prohibition of marriage for the purpose of making the previous husband permissible for the bride- since making the bride permissible for the previous husband is the purpose of the marriage and not to make the woman permissible for the groom.





The Second Major Maxim: “Doubt does not remove certainty”

وبعدها اليقينُ لا يزالُ ... بالشكِّ فاستمع لما يُقالُ

And after it, “Certainty is not removed ... By doubt,” thus listen to what is said

Linguistic Definition of the Maxim

Yaqin, or “certainty,” is a sense of resolve and assuredness of the heart about something. *Shakk*, or “doubt,” is a sense of vacillation between something taking place or not.

What it means is that when a person becomes aware of the existence of something and then doubts whether it exists or not, then the basis is the existence of that thing. And when a person becomes aware of the lack of existence of something, then doubts whether it exists, the basis is the lack of existence of that thing. Why? Because certainty

entails confirmation and doubt entails hesitation. Thus, doubt does not have the strength to remove certainty due to its being weaker.

The categories of knowledge are:

1) Ignorance [*Jahl*] 2) Doubt [*Shakk*] 3) Speculation [*Zann*] 4) Knowledge [*ʿIlm*] 5) Certainty [*Yaqīn*]

Importance of the Maxim

This maxim is a major legal foundation around which a majority of juristic rulings revolve. Rather, this maxim encompasses most of the chapters of jurisprudence from customary dealings [*Muʿāmalāt*] to punishments [*ʿAqūbāt*] and legal judgments [*ʿAqdiyyah*]. Based on this, it is said that this maxim entails three-quarters of the knowledge of jurisprudence. As-Suyūṭī, may Allah have mercy on him, said: “This maxim incorporates all chapters of jurisprudence and the issues deducted based on it reach three-quarters or more of jurisprudence.”

An-Nawawī said: “It is a general maxim from which few issues are excluded.”

Other Forms of the Maxim

1) “That which is established by certainty cannot be removed except by certainty.”

2) The expression of Shaykh as-Sa`dī from his poem:

وترجع الأحكام لليقين ... فلا يُزيل الشك لليقين

“Legal rulings stem from certainty ... Thus, doubt does not erase certainty”

Proofs for the Maxim

This maxim is derived from evidences in the Quran, Sunnah and the intellect.

From the Quran:

﴿وَمَا يَتَّبِعُ أَكْثَرُهُمْ إِلَّا ظَنًّا إِنَّ الظَّنَّ لَا يُغْنِي مِنَ الْحَقِّ شَيْئًا﴾

{And the majority of them do not follow but speculation. Truly, speculation does not dispense with the truth at all}¹⁹

¹⁹ Yūnus: 36

From the Sunnah:

لَا يَنْصَرِفُ حَتَّى يَسْمَعَ صَوْتًا أَوْ يَجِدَ رِيحًا

*“Do not discontinue [the prayer] until one hears a sound or finds a smell.”*²⁰

From the intellect:

Doubt is not strong enough to dispel a matter that is established and affirmed with certainty.

Application of the Maxim

If a person doubts whether they prayed three or four units of prayer, then they assume it is three units.

When a person is certain of the occurrence of a marriage contract and there is doubt about the occurrence of divorce, then the basis is the marriage contract is in effect.

When a person who is fasting doubts whether the sun has set and given the difference between “doubt” and “preponderance of the doubt”, then it is not permissible to break the fast since the basis of understanding is that it is

²⁰ Ṣaḥīḥ al-Bukhārī #177

still day time. If there is doubt regarding whether the sun has risen, it is permissible to eat since the basis of understanding is that it is still nighttime.

Subordinate Maxims

1) That which is established with certainty is not removed except by certainty

Since certainty cannot be dispelled by doubt, then [certainty] is what dispels [other things], nor is it removed by a certainty like it.

2) The basis of something remains as it was. This means that whatever is established to be in a certain condition in the past whether established as affirmed or denied, then it remains in that condition and does not change as long as proof for [some other] condition is not found. This is because the inherent “association” [‘Istiṣḥāb] in the Arabic language is “accompaniment” [Mulāzamah] and lack of separation [Mufāraqah]. Thus, the one in a ritual state of purity [Mutatahhir] who doubts whether he has committed a nullifier remains in a ritual state of purity.

3) The basis is freedom of obligation [Barā’at adh-Dhimmah]. So, whoever claims that someone owes a

debt, the claim is not established except with proof. This is adopted from the narration of the Prophet ﷺ:

الْبَيِّنَةُ عَلَى الْمُدَّعِي، وَالْيَمِينُ عَلَى الْمُدَّعَى عَلَيْهِ

“The burden of proof is on the claimant while the defendant gives an oath.”²¹

4) The basis is to attribute an incident to the nearest of its timings. Examples of this are:

A) If a wife alleges that her husband divorced her in the sickness preceding his death in order to prohibit her from inheriting from him; and the inheritor claims that he divorced her while healthy- then the preponderant view is that of the wife since the matter of the incident is differed over in terms of the time that it occurred. In this case, the incident is divorce during sickness. So, the maxim mandates that the divorce be attributed to the nearest point in time which is the sickness preceding death and this is what the wife alleged. This holds true as long as the

²¹ At-Tirmidhī transmitted it and al-Bukhārī, Muslim and Ibn Mājah related narrations with the same meaning.

inheritor does not bring proof that the divorce took place while the husband was healthy.

B) A person wakes up in order to pray the *Zuhr* prayer and finds traces of semen on his clothes as a result of a nocturnal emission. The problem posed is- did this happen during his sleep after the *Fajr* prayer rendering his *Fajr* prayer valid or was it from the night before requiring him to make major ablution [Ghusl] and repeat his *Fajr* prayer? We hold that since he cannot be certain and contextual evidences [Qarā'in] are not found, then the basis is to attribute the state [of major impurity] to the nearest of timings. Based on this maxim, we determine that the state which applies is that the impurity happened after the *Fajr* prayer; and based on this we determine that the *Fajr* prayer was valid.

5) The basis regarding things is permissibility and purity. This means that everything is permissible and pure unless there is proof to change it from its basis.





The Third Major Juristic Maxim: “Difficulty Leads to Facilitation”

وتجلبُ المشقة التيسيرا ... ثالها فكن بها خيرا

“And difficulty leads to facilitation” ... Their third [major Maxim]. Thus, be aware of it”

Linguistic Definition of the Maxim

Mashaqqah, or “difficulty” means a struggle and hardship.

Allah ﷻ says:

﴿وَتَحْمِلُ أَثْقَالَكُمْ إِلَىٰ بَلَدٍ لَّمْ تَكُونُوا بَالِغِيهِ إِلَّا بِشِقِّ الْأَنفُسِ﴾

*{And they transport your heavy loads to a land you could not reach except with great difficulty}*²²

²² An-Nahl: 7

Taysir, or “facilitation,” means easiness and ease.

Technical Definition of the Maxim

The technical meaning intended in the maxim is that a difficult matter which proves harmful for a person whether mentally or physically, is to be lightened for him in proportion to his condition.

Other Forms of the Maxim

- 1) When a matter becomes restrictive there should be accommodation.
- 2) As-Sa`dī expressed the maxim in his poem as:

ومن قواعد شرعنا التيسيرُ ... في كل أمر نأبؤه تعسيرُ

Among the maxims of our law is “facilitation ... for every matter in which difficulty approaches”

Proofs for the Maxim

From the Quran:

﴿يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ﴾

*{Allah desires ease for you and does not wish difficulty for you}*²³

﴿لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا
اَكْتَسَبَتْ﴾

*{Allah does not burden a soul beyond its ability; for each is what it has earned and against it is what it has earnea}*²⁴

﴿يُرِيدُ اللَّهُ أَنْ يُخَفِّفَ عَنْكُمْ﴾

*{Allah wishes to lighten the burden for you}*²⁵

﴿وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ﴾

*{And He has not made the Dīn difficult for you}*²⁶

﴿مَا يُرِيدُ اللَّهُ لِيَجْعَلَ عَلَيْكُمْ مِنْ حَرَجٍ﴾

*{And Allah does not wish to make things difficult for you}*²⁷

²³ Al-Baqarah: 185

²⁴ Al-Baqarah: 286

²⁵ An-Nisā': 28

²⁶ Al-Hajj: 78

²⁷ Al-Mā'idah: 6

﴿فَاتَّقُوا اللَّهَ مَا اسْتَطَعْتُمْ﴾

{So, fear Allah as much as you can}²⁸

From the Sunnah:

Al-Bukhārī transmitted a narration in his *Ṣaḥīḥ* on authority of Abū Hurayrah رضي الله عنه, the Prophet ﷺ said:

إِنَّ الدِّينَ يُسْرٌ، وَلَنْ يُشَادَّ الدِّينَ أَحَدٌ إِلَّا غَلَبَهُ، فَسَدِّدُوا وَقَارِبُوا،
وَأَبْشِرُوا، وَاسْتَعِينُوا بِالْغَدْوَةِ وَالرَّوْحَةِ وَشَيْءٍ مِنَ الدُّلْجَةِ

“The Dīn is ease. No one is excessive in the Dīn except it overwhelms him. So be temperate. Do what is near [of worship and good deeds], rejoice [at the rewards] and seek support [through those deeds] in the morning and evening and also a little during the night.”²⁹

And the narration of the Prophet ﷺ:

لَوْلَا أَنْ أَشَقُّ عَلَى أُمَّتِي أَوْ عَلَى النَّاسِ لَأَمَرْتُهُمْ بِالسَّوَاكِ مَعَ كُلِّ
صَلَاةٍ

²⁸ At-Taghābun: 16

²⁹ Ṣaḥīḥ al-Bukhārī #39

“If it would not have been too difficult on my Ummah, I would have ordered them to brush their teeth for every prayer.”³⁰

And the narration of the Prophet ﷺ:

فَإِنَّمَا بُعِثْتُكُمْ مُيَسِّرِينَ، وَلَمْ تُبْعَثُوا مُعَسِّرِينَ

“You are only sent as people who facilitate things, not as people who make things difficult.”³¹

The Categories of “Mitigation” [Takhfif] in the Law and Examples

1) Laws legislated from their inception for the purpose of facilitation [Taysir]. This applies to most legal responsibilities in normal circumstances. This maxim does not mean that there are matters in Islamic law in which they entail difficulty as a basis. Rather, the basis of legislation is ease [Yusr], however, incidents may happen which render this “ease” into a difficulty with respect to a

³⁰ Ṣaḥīḥ al-Bukhārī #887

³¹ Ṣaḥīḥ al-Bukhārī #220

specific individual. Thus, Islamic law comes and mitigates the difficulty.

2) Laws that illustrate the exemptions and contingencies termed as “dispensations” [Rukhkhaş]. For example, the permissibility of breaking the fast due to sickness or hardship; and the permissibility of eating carrion due to compulsion or necessity.



Topics in Permission [Rukhşah]

1) Criteria for Hardship [Mashaqqah]

Some may ask the question, “What is the criteria of hardship that results in the easing of legislation?” The reason for the question is that a majority of people hide behind the excuse of hardship whenever they are held responsible for a matter, saying, “This entails hardship,” “I cannot manage this,” and “I am not able to do this.” Perhaps they resort to the statement, “The *Din* is ease.”

Perhaps they might even say, “Truly, difficulty leads to facilitation.” Yet, does every difficulty lead to facilitation? We respond to that with two categories:

A) Difficulty that, much of the time, cannot be separated from acts of worship

For example, the difficulty of fasting on a hot, long day; the difficulty of *Jihād*, *Hajj*, and striving in seeking knowledge. For the majority of these difficulties there can be no separation from the act of worship itself. The difficulty of these acts alone does not relieve legal responsibility nor obligate mitigation because he who seeks mitigation would then be neglectful and extreme in his avoidance.

B) Difficulty that can be separated from acts of worship a majority of the time

As a basis, difficulty does not accompany acts of worship, so that if there is a severe difficulty [Mashaqqah `Azīmah] like fearing great physical harm or fearing death upon washing the body or part of the body, then this is the level of difficulty that leads to facilitation. As for the insignificant difficulty [Mashaqqah Khafifah] like the

onset of a headache or a light, general malaise, then it has no effect or consideration since realizing the overwhelming benefits from acts of worship is a higher priority than repelling a harm which has little to no effect.

2) Types of Permissions [Rukhṣah]

The jurists [Fuqahā'], may Allah have mercy on them, mentioned that legal Permission has seven categories:

A) Permission of Cancellation [Rukhsat 'Isqāt]

An example of this type is when acts of worship are cancelled in the presence of a legitimate excuse like the cancellation of the prayer for the woman menstruating or during post-partum bleeding; and the cancellation of the obligation of the pilgrimage [Ḥajj] for the woman who does not have a close male relative [Maḥram] to accompany her.

B) Permission of Reduction [Rukhsat Tanqīṣ]

In other words, the reduction in the amount of an act of worship in the presence of a legitimate excuse. An example of this is shortening the prayers for the traveler.

C) Permission of Exchange [Rukhsat 'Ibdāl]

In other words, there is an exchange of one act of worship for another. An example of this is the exchange of minor [Wuḍū'] and major ablution [Ghusl] for the dry ablution [Tayammum] when water is not available or when water cannot be used; or the exchange of standing in the prayer for sitting or lying down when a person is incapacitated.

D) Permission of Advancement [Rukhsat Taqdim]

An example of this type is the advance and combination of the *Zuhr* and *Aṣr* prayers at Arafāt; advancing the obligatory charity [Zakāh] before the year; advancing the charity at the end of Ramaḍān [Zakāt al-Fitr] during Ramaḍān; and advancing the expiation before the violation of an oath. Due to this, scholars said it is permissible to advance something after the materialization of its cause [Sabab] and before the existence of its stipulation [Sharṭ]. An example of this is when a person acquires the amount of taxable wealth requiring payment of obligatory charity [Niṣāb]. The acquisition of a *Niṣāb* is the cause for obligatory charity [Zakāh] being due and a person can advance its payment before the stipulated time, which is the conclusion of a year. Likewise, in the violation of an oath, it is permissible to swear [an oath],

fulfill the expiation for the oath, then violate the oath. However, it is not permissible to fulfill the expiation, swear the oath, then violate it because in that case, the reason for the oath has not been realized, i.e. the intention to fulfill it.

E) Permission of Delay [Rukhsat Ta'khīr]

An example of this is the combining of the *Maghrib* and 'Ishā' prayers at Muzdalifah [during the time of the 'Ishā' prayer]. Another example is delaying the fast of Ramaḍān for the following: the traveler; a woman who is menstruating or experiencing post-partum bleeding; a person who is preoccupied with rescue from drowning; as a precaution for a sick person fearing aggravation of the sickness; or an injured person undergoing a procedure.

F) Permission of Compulsion [Rukhsat 'Idṭirār]

An example of this is a choking person drinking an intoxicant when he is afraid of dying and cannot find anything else; or eating carrion or pork during a famine and fearing death from starvation.

G) Permission of Alteration [Rukhsat Taghyīr]

An example of this is altering the order of the prayer due to fear.

3) Legal Rulings Related to Permissions

The legal ruling for Permissions vary depending on the circumstances of the responsible party. Among the legal rulings are:

A) Permissions that are required to act upon, like eating carrion for the one who is compelled to do so;

B) Permissions that are recommended to act upon, like shortening the prayer while traveling and the permissibility of looking at a betrothed.

C) Permissions that are permissible to act upon, like the *Salam* transaction (to advance payment while delaying delivery of a product).

D) Permissions wherein it is preferred for the responsible party to act upon them, like breaking the fast while traveling for a person who will suffer no harm from fasting.

E) Permissions wherein it is disliked to act upon them, like a traveler combining prayers while being a temporary

resident in the land and shortening prayers during a journey of less than 3 days- according to some jurists.



4) Seven Reasons for Reduction [Takhfij] in Legal Rulings

A) Travel [Safar]

In the preponderant view, travel is defined according to custom [ʿUrf]. At any rate, it is among the reasons for a reduction in legal rulings.

B) Sickness [Marad]

It is defined as the body departing from the condition of balance and routine to distortion and abnormality. Thus, the sick person is permitted to skip the congregational prayer and to pray sitting or lying down depending on what he is able to do. The sick person is also allowed to break his fast if there is difficulty involved in fasting.

C) Compulsion [ʿIkrāh]

In the technical definition of the jurists, it is to force someone else to do something they do not wish to do nor would the person choose to do so if left alone.

D) Obliviousness or Forgetfulness [Nasyān or Sahw]

“Obliviousness” is to be ignorant of the fact that something known is necessary or the lack of producing something at the time it is needed.

Al-‘Izz bin Abd as-Salām, may Allah have mercy on him, said: “Obliviousness is predominant among people and there is no sin for the one who is oblivious.”

Thus, if a person is oblivious and is not able to know something, the obligation of that thing is canceled through the passing of the moment in which it was required; like a person’s oblivion towards the eclipse prayer. In addition, when the perception of something approaches the rights of Allah ﷻ or the rights of His slaves, like prayer, *Zakāh*, and spending on wives, his knowing that thing is obligatory.

E) Ignorance [Jahl]

It is defined as a deficiency in knowledge. In technical terms it is to resolutely believe something contrary to what it is in reality. Thus, ignorance is a reason for the absolution of a sin, guilt and responsibility for a responsible individual. Ignorance also prevents the assumption of legal responsibility in other cases.

This is not an invitation to ignorance since a person can have no excuse through his own neglect, rather it is obligatory for people to learn what is indispensable in performing acts of worship and that without which acts of worship are invalid. If a person yields and strives in knowledge, yet remains ignorant in some issues, then he is absolved of guilt in that case.

F) Difficulty [ʿUṣr] & General Afflictions [ʿUmūm al-Balwā]

“Difficulty” [ʿUṣr] is hardship in warding off something. “General afflictions” [ʿUmūm al-Balwā] means the spread of tribulations such that it is difficult for a man to put distance between himself and the tribulations.

G) Innate Deficiency [Naqṣ Ṭabīʿī]

“Deficiency” [Naqṣ] is the opposite of completeness and wholeness. For that reason, the child and mentally-challenged are not held legally responsible due to their mental deficiency; and the affairs related to their wealth are delegated to a trustee or guardian.

Likewise, there is a lack of legal responsibility for women in much of what is obligatory for men, like attending the Friday prayer and congregational prayers in general. This is not categorized, how some allege, as an unnatural deficiency. Some misinterpret lack of legal responsibility as a disparagement of women by alleging it is related to tenuousness in the *Dīn*. They wrongly derive this conclusion from the statement of the Prophet ﷺ:

عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ...
"مَا رَأَيْتُ مِنْ نَاقِصَاتٍ عَقْلٍ وَدِينٍ أَذْهَبَ لِلْبَّ الرَّجُلِ الْحَازِمِ مِنْ
إِحْدَاكُنَّ."

On authority of Abū Saʿīd al-Khudrī ؓ, the Messenger of Allah ﷺ said: 'I have not seen anyone more deficient in

*intellect and religion than one of you take away the mind of a prudent man.*³²

The Prophet ﷺ made it clear that women stop praying during their menses and post-partum bleeding, however it is not a reason for disparagement because it is an innate or natural deficiency. There is nothing abnormal about it except some men interpret that in a way to disparage women despite the fact that the people of knowledge hold the view that when a woman stops praying due to menses or post-partum bleeding, she is still compliant and obedient in her abstention- the same way as if she had fulfilled the command to pray. Thus, from the perspective of a woman's obedience to the command not to pray, it is more likely a characteristic of "completeness"- the opposite of "deficiency"- with regards to their legal responsibilities.

Subordinate Maxims

1) Necessities [Ḍarūrāt] make otherwise prohibited matters permissible.

³² Ṣaḥīḥ al-Bukhārī #304

For example, the case of seeing the private areas of a sick person during treatment.

2) Need [Ḥājah] may occupy the position of necessity [Ḍarūrah].

For example, the case of the prayer while riding a mount when it begins to rain.

3) That which entails ease is not canceled by that which entails difficulty.

For example, in the case of someone using a splint to set a broken bone. The person in this circumstance may not wash the place where the splint is located due to the hardship entailed in that, however he must at least wipe over it.

4) That which is permitted due to necessity [Ḍarūrah] is allowed in proportion to the amount of the necessity.

Thus, when it is allowed for a person to eat carrion due to fear of death, then he must not eat to the point of satiation. Rather, he should only eat enough to ward off death.

5) That which is allowed due to an excuse [ʿUdhr] is cancelled by means of the end of [the excuse].

An example of this when a person shortens the prayer while traveling. When he returns to his city, the shortening of the prayer is canceled since the excuse has ended.





The Fourth Major Maxim: “Harm Must Be Removed”

رابعها فيما يُقال الضرر ... يُزال قولاً ليس فيه غررٌ

Its fourth is regarding what is said: ‘Harm ... Must be removed’ – a statement in which there is no danger.

Linguistic Definition of the Maxim

Ḍarār means harm [‘Ādhīyyah] and corruption [‘Ifsād].

Yuzāl means “[must] be lifted” [Yartafi`] and “[must] be put aside” [Yunaḥḥā]

Technical Definition of the Maxim

Actual harm to people at the hand of others must be removed before it happens, while it is happening and after it happens [i.e. its effects].

Importance of the Maxim

This maxim brings us the preservation of the five necessities [i.e. *Din*, life, lineage, wealth, and the mind].

Another form of this maxim is: “There is no initiating harm nor reciprocating harm.”

Proofs for the Maxim

﴿وَلَا تُمَسِّكُوهُمْ ضَرَارًا لِّتَعْتَدُوا﴾

{And do not retain them as a form of harm [towards them] so that you end up transgressing}³³

﴿وَلَا تُضَارُّوهُمْ لِّضَيِّقُوا عَلَيْهِمْ﴾

{And do not do them harm in order to constrain them}³⁴

﴿لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ﴾

³³ Al-Baqarah: 231

³⁴ At-Talāq: 6

*{And do not harm a mother through her child nor a father through his child}*³⁵

From the Sunnah:

On authority of Abū Sa`īd al-Khudrī رضي الله عنه, the Messenger of Allah ﷺ said:

لَا ضَرَرَ وَلَا ضِرَارَ

*“There is no initiating harm nor reciprocating harm.”*³⁶

Another narration says:

مَنْ ضَارَّ ضَارَّ اللَّهُ بِهِ، وَمَنْ شَاقَّ شَقَّ اللَّهُ عَلَيْهِ

*“Whoever does harm, Allah will do harm to him. And whoever causes difficulty, Allah will cause him difficulty.”*³⁷

³⁵ Al-Baqarah: 233

³⁶ Al-Hākim #2345; it has an “expedited” [Mursal] chain; graded “fair” [Hasan].

³⁷ At-Tirmidhī #1940; graded “fair” [Hasan].

Application of the Maxim

- 1) Cheating is prohibiting in sales.
- 2) The annulment of a marriage contract due to defect.
- 3) If Zayd has the right to pass through a road belonging to Amr, then Amr is not allowed to prevent Zayd from passing through that road.
- 4) It is not permissible for a person to sell defective currency to another person without mentioning the defect present in it. The seller hiding the defect of a defective product from the buyer is doing harm to him and it is legally prohibited and proscribed.
- 5) It is not permissible for the people of a town to prevent a person from settling in their town on account that they do not wish to live together- because their action in this case is harmful and harm is proscribed as we mentioned.
- 6) Hunting is permissible except certain ways of hunting, such as when the reason is to cause the flight of animals or the reason is to cause fear and disturbance in domestic animals. Hunters are proscribed from such types of hunting.

7) It is permissible for a person to build a window in his wall. However, if it brings into view the neighboring women, it is proscribed to build the window.

Subordinate Maxims

1) Harm must not be removed with a similar harm.

For example, a person being forced to kill someone else is not allowed to do so in order to ward off the duress from himself.

2) The individual harm [Ḍarār Khaṣṣ] must be endured in order to ward off the general harm [Ḍarār `Ām].

And example of this is the quarantine of a person sick with a stomach illness in order to limit their harm to others.

3) Choose the lesser of two evils.

For example, placing an irresponsible and foolish person under legal guardianship in order to preserve his wealth and the rights of people.

4) When confronted by two evils, one should guard against the greatest harm by committing the lesser evil.

5) Warding off an evil is better than bringing about a benefit. This is among the greatest legal maxims of the *Din*.





The Fifth Great Juristic Maxim: “Convention is a Legal Determinant”

خامسُها العادة قل: محكمة . . . فهذه الخمسُ جميعاً محكمة

Its fifth is the convention. Say: ‘it is legally determinant’ ...

Now these are the five that have been determined.

Linguistic Definitions:

‘Convention’ [*Ādah*]

In the Arabic language, the term *Ādah* means a custom [*Daydan*], matter [*Sha’in*] or something continuous [*Istimrār*]. It is called that because the person who does it repeats and returns to it time and again, just as Allah ﷻ said:

﴿رَبَّنَا أَخْرِجْنَا مِنْهَا فَإِنْ عُدْنَا فَإِنَّا ظَالِمُونَ﴾

*{Our Lord! Take us out of it. For if we return, then truly we are oppressors}*³⁸

Allah ﷻ also said:

﴿بَلْ بَدَا لَهُمْ مَا كَانُوا يُخْفُونَ مِنْ قَبْلُ وَلَوْ رُدُّوا لَعَادُوا لِمَا نُهُوا عَنْهُ
وَإِنَّهُمْ لَكَاذِبُونَ﴾

*{Rather, what they used to hide has appeared before them. And if they should return, truly they would revert back to what they had been prohibited from and indeed they are liars}*³⁹

“Legal Determinant” [Muḥakkamah]

The term *Muḥakkamah* is the past participle form of the term *Taḥkim* which means “to judge” [Qaḍā’] and “to decide” [Faṣl] between people. In other words, a custom can be a legal determinant that is referred to in matters of legal cases and adjudication.

³⁸ Al-Mu’minūn: 107

³⁹ Al-‘An`ām: 28

‘Custom’ [‘Urf]

The term “custom” [‘Urf] is close in meaning to that of “convention” [‘Ādah]. Due to this, the author of the book *Muḥjam Maqāyis il-Lughah*, ‘Aḥmad bin Fāris, said about the root meaning of the term “custom” [‘Urf]: “Arafa – with Ayn, Rā’ and Fā’; [the meaning] has two sound bases, one of which denotes calmness and tranquility.”

As for the term “convention” [‘Ādah] according to the jurists, al-Qarāfi, may Allah have mercy on him, defined it as “a predominance of a certain meaning among various meanings for all lands or some of them.”

The term “custom” [‘Urf] according to the jurists is something firmly established among the people; something favorable in their minds; something that someone of sound character would meet with acceptance; and something that people persist in doing that Islamic law does not disapprove of and rather, it allows it for them.

Thus, the technical definition of the legal maxim means that convention can produce a legal determinant for the establishment of a legal ruling.

There is a general and specific connection between custom [ʿUrf] and convention [ʿĀdah]. Convention is more general in scope than custom since there is individual convention and popular convention- which is custom. Thus, convention is more general and perpetual, while custom is more specific since it is a type of limited convention. So, every custom is a convention, however not every convention is a custom because convention (whether collective or individual) is common to everything that each individual is accustomed to, like the way he dresses, walks, eats, speaks, etc.

Custom [ʿUrf] is what the people of a land are acquainted with and what they are accustomed to. Thus, we are able to specify after establishing this that convention is more general since it includes the collective convention, or “the convention of the people of a land,” as well as the individual convention, or “that which each individual is accustomed to”.

As for the custom with which only the people of a land are acquainted, it includes what the people of a land recognize and not individual conventions. Despite this, custom and convention have a single meaning when the jurists discuss

them and base legal rulings upon them- in that case there is no way to differentiate between the two terms.

In summary, convention [ʿĀdah] refers to collective or individual convention that each individual is accustomed to. While custom [ʿUrf] refers to that which people in a certain land are acquainted with and accustomed to.

Importance of the Maxim

Some of the scholars indicated the importance of this legal maxim by saying: “Among the most important legal maxims is consideration of convention and reference to it. Each thing that convention testifies to can be judged by means of it. And anything found detestable according to conventions is disliked in acts of worship as well.”

The theme of this legal maxim is its flexibility in responding to a great many issues and newly arising matters. It encompasses many of the legal issues which benefit from its ease and flexibility and it encompasses many ancillary legal issues [Furūʿ] as well. Thus, whoever assiduously examines this legal maxim and does not reject that “those legal rulings founded upon customs and overall benefits change with the passage of time” will perceive the

flexibility of the horizons of Islamic jurisprudence. This legal maxim will suffice him as a complete agent for presenting successful solutions for legal issues and unprecedented problems. It will afford a person competency for adapting to life's journey and grant a person adequacy in all times and places. That is also because Islam itself is a *Dīn* that is practical for all times and places and at the same time it does not yield to every time and place.

Ibn `Ābidīn says in his *Risā'ih*: "Custom has consideration in Islamic law. Therefore, legal rulings revolve around it." He also said, may Allah have mercy on him: "Know that consideration of customs and conventions is referred to in a great many legal issues to the point that the scholars made it a legal principle." Thus, regarding legal principles under the topic of "Things for Which the Literal is Abandoned," scholars said: "The literal is abandoned through the indication of figurative usage and convention." In his commentary on the book *Al-'Ashbāh*, al-Bayrī said: "To establish something by means of convention is to establish it by means of a legal proof." And in his book *Al-Mabsūṭ*, as-Sarakhsī said: "What is

established through custom is as if it was established through textual evidence.”

Other Forms of the Maxim

- 1) “Legal rulings are regarded through the lens of customs.”
- 2) “Legal rulings operate along with customs and people’s intentions.”



Proofs for the Maxim

From the Quran:

﴿خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ الْجَاهِلِينَ﴾

*{Show forgiveness, enjoin al-`Urf and turn away from the foolish}*⁴⁰

⁴⁰ Al-`A'rāf: 199

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا لِيَسْتَأْذِنَكُمْ الَّذِينَ مَلَكَتْ أَيْمَانُكُمْ وَالَّذِينَ لَمْ يَبْلُغُوا الْحُلُمَ مِنْكُمْ ثَلَاثَ مَرَّاتٍ مِنْ قَبْلِ صَلَاةِ الْفَجْرِ وَحِينَ تَضَعُونَ ثِيَابَكُمْ مِنَ الظَّهِيرَةِ وَمِنْ بَعْدِ صَلَاةِ الْعِشَاءِ ثَلَاثُ عَوْرَاتٍ لَكُمْ﴾

*{Oh, you who believe! Your slaves and those among you who have not reached puberty should seek your permission at three times- before the Fajr prayer, when you take off your clothes at noon, and after the 'Ishā' prayer. Those are the three times of privacy for you...}*⁴¹

After he mentioned this noble verse, *ai-Imām al-'Alā'ī* said: “Allah ﷻ commanded seeking permission during those times in which it was the convention to let down one’s guard and take off one’s clothing. Thus, the legal ruling became necessary based on what they were accustomed to.”

﴿وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ﴾

⁴¹ An-Nūr: 58

*{And they are due the same good treatment as that which is due from them}*⁴²

﴿وَعَايَرُوهُنَّ بِالْمَعْرُوفِ﴾

*{And grant them good company}*⁴³

﴿لَا يُؤَاخِذُكُمُ اللَّهُ بِاللَّغْوِ فِي أَيْمَانِكُمْ وَلَكِنْ يُؤَاخِذُكُمْ بِمَا عَقَّدْتُمُ الْأَيْمَانَ فَكَفَّارَتُهُ إِطْعَامُ عَشْرَةِ مَسَاكِينَ مِنْ أَوْسَطِ مَا تُطْعَمُونَ أَهْلِيكُمْ﴾

*{Allah will not take you to task for the mistakes in your oaths, however He will take you to task for the oaths which you have obligated upon yourselves. Thus, the expiation is to feed ten poor people from the average of what you feed your own household...}*⁴⁴

⁴² Al-Baqarah: 228

⁴³ An-Nisa': 19

⁴⁴ Al-Ma'idah: 89

From the Sunnah:

There are two routes from which the proof of customs and conventions is derived:

1) The spoken tradition of the Prophet ﷺ [Sunnah Qawliyyah]

There is what al-Bukhārī transmitted in his *Ṣaḥīḥ* from a narration of `Ā'ishah رضي الله عنها that Hind bint `Utbah رضي الله عنها said: “Oh Messenger of Allah! Truly, Abū Sufyān is a stingy man and does not give me and my child except what he is unaware that I take from him.” So, the Prophet ﷺ said:

خُذِي مَا يَكْفِيكِ وَوَلَدَكَ، بِالْمَعْرُوفِ

*“Take what will suffice you and your child within reason.”*⁴⁵

An-Nawawī said about this narration in in his commentary on *Ṣaḥīḥ Muslim*: “In this narration are several benefits, among which is reliance upon customs regarding matters in which there are no legal criteria.”

⁴⁵ Ṣaḥīḥ al-Bukhārī #5364

On authority of Ibn `Umar رضي الله عنه, the Messenger of Allah ﷺ said:

الْوَزْنُ وَزْنُ أَهْلِ مَكَّةَ، وَالْمِكْيَالُ مِكْيَالُ أَهْلِ الْمَدِينَةِ

“The preferred scale for measurement is the scale of the people of Makkah and the preferred measurement for dry goods is the measurement of the people of Madinah.”⁴⁶

Thus, the Messenger ﷺ considered the convention of the people of Madinah since dry measurements were their convention; and the people of Makkah were people of harvest, so he deferred to their conventions in scales.

فَمَا رَأَى الْمُسْلِمُونَ حَسَنًا، فَهُوَ عِنْدَ اللَّهِ حَسَنٌ

“Thus, whatever the Muslims hold to be good, then it is good according to Allah.”⁴⁷

⁴⁶ Sunan ‘Abī Dāwud #3340; declared “authentic” [Ṣaḥīḥ] by al-‘Albānī.

⁴⁷ Musnad al-‘Imām ‘Aḥmad #3600

Al-‘Albānī graded this narration “weak” [Da‘īf]; Aḥmad Shākir graded it “authentic” [Ṣaḥīḥ]; and al-Wādi‘ī graded it “fair” [Ḥasan].

2) The tacit agreement [Taqrīr] in the traditions of the Prophet ﷺ [Sunnah Taqrīriyyah]

People were aware of matters related to the worldly-life in the time of the Prophet ﷺ that had not been proscribed nor prohibited. Thus, this proved the permissibility of these matters just as they were aware of matters which suggested that the Prophet ﷺ approved of them and even shared with them in doing. This also demonstrates their permissibility.

Among the clearest examples of that is the *Salam* contract. The Arabs had known of it before the advent of Islam and the Messenger approved of that for them. Al-Bukhārī transmitted on authority of Ibn ‘Abbās رضي الله عنه that when the Prophet ﷺ had arrived in Madinah, they were advancing the payment of dates by one and two years, so he said:

مَنْ أَسْلَفَ فِي شَيْءٍ، فَفِي كَيْلٍ مَعْلُومٍ، وَوَزْنٍ مَعْلُومٍ، إِلَى أَجَلٍ
مَعْلُومٍ

“Whoever advances the payment of something, then let it be for a known measure and known weight [to be delivered at] a known time.”⁴⁸



Application of the Maxim

- 1) When two people agree to a sale with cash without defining terms, then they differ over it, what is decisive with a cash sale, in most cases, is the exchange that took place during the sale.
- 2) The definition of the amount of travel in which the prayer is shortened is determined by what is customary to people.

⁴⁸ Ṣaḥīḥ al-Bukhārī #2240

3) The distinction between terms intending divorce and other terms is according to the custom of people.

4) Under the topic of menstruation and post-partum bleeding: the scholars said that if blood came beyond the conventional number of days for menstruation and post-partum bleeding, whatever is beyond the conventional is considered “invalid” blood. The “conventional number of days” is known by the convention in that matter, in other words, whether the conventional number of days for menstruation/post-partum bleeding is five or six, etc. Thus, in this case we judge by convention or custom.

5) A lot of movement in the prayer without an overwhelming benefit invalidates the prayer. If the movement was a small amount then it does not invalidate it. The standard for the movement in determining whether it is a lot or a little is referred to what is customary. [There is debate on this point]

6) The *Salam* sale is to advance a payment and delay delivery of the goods. This type of transaction is legislated in opposition to analogical reasoning as a means of warding off harm and to make things easy for people. It was made permissible for people so they might be aware

of it in their dealings. An example of that is when a farmer comes to a merchant and says, "Give me 100,000 riyal and I will give you 1,000 bushels of wheat from next year's harvest." In principle, this is not permissible, however it was made permissible, as we mentioned, to ward off harm and make things easy for people.

7) Qualification for marriage whether related to *Dīn*, freedom, healthiness from perceived defects or occupation- all depend on how people perceive them and how they are seen by one another. Thus, there are characteristics which are esteemed or disparaged according to people and there are trades they find to be honorable or dishonorable. [This is all based on custom and convention]

Topics Related to the Maxim

Customs are divided into the following two categories:

1) Verbal Custom

This means that the usage of certain terms or phrases with a specific meaning are widespread between people such that the specific meaning reached the point where it is what is understood and comes to mind when used without

additional context. The usages of the various towns vary, so a wording is used in a highland, for example, and it differs in another part of the land while the meaning is the same.

2) Physical Custom

This refers to the habit of people to perform a conventional act such as their specific way to hold a wedding or their way to dress, etc.

Stipulations for Acting Upon Custom & Convention

Not every custom is valid as a basis for juristic rulings nor for consideration as proof to which the jurist may refer back when there is a lack of textual proof whether from the Book, the Sunnah or consensus [‘Ijmā’]. Rather, scholars have placed the following stipulations on the usage of custom and convention:

1) The convention or custom must be consistent or predominant.

As-Suyūṭī, may Allah have mercy on him, said in *al-Ashbāh wan-Naẓā’ir*: “Convention is only considered

when it is consistent. Thus, if it is not a settled matter, then it is not considered.” In other words, people of a land must act on a certain convention constantly in all instances without varying [their actions], such as advancing the dowry before consummation of the marriage, when the people of a certain land are known for that.

2) The custom intended for arbitration regarding behaviors must exist upon the initiation of said behaviors.

Due to this stipulation, scholars said: “There is no regard for the casual custom.” In other words, the custom which induces the behavior must be present at the time of initiation [of the behavior] in that the establishment of the custom precedes the time of the behavior. Then, [the custom] persists to the time of [the behavior]. And in that way, the [custom] is coupled with [the behavior]. This is regardless of whether the behavior is verbal or physical.

3) The most important stipulation is that a custom cannot neutralize an established textual proof [Naşş] or a definitive principle in Islamic legislation.

Thus, there is no regard for the custom that opposes the legal texts: such as it being customary for all of a certain

people to consume intoxicants or gamble; for women to walk behind the funeral procession; for women to visit cemeteries; and lighting candles at graves. Or if the people of a land, for example, are known for allowing the wife to sit with the brothers of her husband, greet them and shake their hands- this custom and convention does not grant permission to the actions. So, one should take notice of that due to its opposition to the legal texts.

4) The custom must not be opposed by an authorization contrary to it.

Al-`Izz bin `Abd as-Salām said: “When two contracting parties authorize a stipulation which is contrary to anything established in customs, as long as the stipulation agrees with the intent of the contract and it is possible to fulfill it, it is valid.” For example, a person goes out and buys merchandise then differs with the seller regarding who will ship the merchandise. If the custom of the people of that land is the seller is the one who ships the merchandise, however, during the writing of the contract, the seller says to the buyer, “The principle and custom is that I am the one who ships the merchandise, however I will write the stipulation for you that you are the one who

ships it.” Thus, the seller writes the condition and then a dispute takes place. Does the judge rule in favor of the custom or the stipulation? He rules in favor of the stipulation not the custom since the custom in this case is opposed by an authorization contrary to it.

The Legal Ruling on the Opposition of Literal Linguistic Significance, Islamic Law and Customs

The scholars of legal principles [‘Usūliyyūn] divided literal terminologies [Lafẓ Haqīqah] into the following categories: linguistic [Laghawīyyah], legal [Shar‘īyyah] and customary [‘Urfiyyah].

Thus, when a term is mentioned that has a meaning in language as well as in customary usage, the term is interpreted according to custom since it is inconsistent in the language. Rather, the legal ruling favors that which the understanding of the people rush towards. If a term has a meaning in language and in law, it is interpreted according to what the law intends since it is inconsistent

in language and because the objective is to clarify a ruling of law, so to interpret it [according to its legal definition] is even more appropriate.



Subordinate Legal Maxims

1) A legal verdict [Fatwā] changes with a change of circumstances [‘Aḥwāl].

For example, estimating the expenditure of a wife is according to the circumstances of each time and place.

2) Specification [Ta’yīn] by means of custom is like specification by means of textual proof [Naṣṣ].

For example, someone rents a house in a residential neighborhood. Its use is specified for residential use as is customary for similar houses. Thus, it is not valid to use the house as a warehouse for merchandise or to convert it into a place of business without permission from the owner of the house.

Another example is someone rents a car for normal use. Thus, it is not allowed to transport something a similar vehicle would not transport, such as animals or garbage.

3) There is no regard for the inconsistent custom [‘Urf Ṭāri’].

4) Figurative usage [‘Isti`māl] of people is a proof that is obligatory to act upon.

5) Custom is only considered when it is consistent [‘Itṭarād] or predominant [Ghālib].

6) What is well-known [Ma`rūf] as custom is like something stipulated as a condition [Shart].

For example, someone borrows a car from his friend. The borrower should not travel with the car outside the city since this is something well-known to him and thus, it is like a stipulation. This is the case as long as the borrower is not explicitly permitted to do that.

7) Something well-known to business people is like a stipulated matter between them.

For example, when it is well-known among real-estate agents in a city that the labor that the associate of a real-

estate office performs is paid by the seller or the employer, then this is a requirement for any contract issued as long as something contradicting it is not made clear.

Another example is when merchants know that the transport of merchandise to the vehicle of the buyer or shipment of it to his home is included under the contract of the buyer, then it is a requirement for the merchant to do so free of charge, as long as something contradicting it is not made clear.

8) The impossible [Mumtani`] according to convention is like the impossible in reality.

For example, if a poor person claims that he loaned a large amount of money to a wealthy person, his claim is not accepted.

وصلی اللہ علی سیدنا محمد وعلی آلہ وصحبہ وسلم تسلیما کثیرا

والحمد للہ رب العالمین

May the blessings of Allah be upon our master Muḥammad, his followers and his companions, a great number of blessings.

All praise is due to Allah, Lord of the Worlds.



Notes: